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Property

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PROPERTY

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In the past, property exemplified law as an ordered set of rules, each axiom fitting nicely into an almost immovable intellectual mosaic of immense size. This obsolete rule grid still serves a purpose. It has been pressed into service as a vehicle to test aspirants for admission to the bar, now that even the bar examiners in this Republic have succumbed to using multiple choice questions susceptible to machine scoring. The irony is that this bar examination law does not mirror the real law, the common-law model having been destroyed by the entropy that typifies this fragile society. Order has largely been displaced by disorder. This year's *Survey* takes a calculated risk and attempts to discern whether, amidst today's kaleidoscope of statutes and cases, there is any pattern discernable to reason in the realm of property law.

I. LEGISLATION

A. *Tenancy by the Entirety*

Tenancy by the entirety still exists in New York.[1] Yet Professor John Cribbet, in the very first edition of his student text on property lore, suggested that it was "high time for this vestige of an older day to join *jure uxoris* and coparcenary in the real property museum."[2] More recently, he predicted that "tenancy by the entirety will vanish into well-deserved obscurity under the assault of women's rights."[3] Still, it might be thought that tenancy by the entirety had some utility as a device to protect the home of a surviving frugal spouse from the creditors of his or her improvident partner. Thanks to the Congress of these United States, that rationale may now have become a frail reed.

Tenancy by the entirety was dealt with in the Bankruptcy Reform Act of 1978,[4] which took effect on October 1, 1979.[5] The new

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1. N.Y. EPTL 6-2.2(b) (McKinney Supp. 1979).
2. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 94 (1962).
3. Cribbet, *Property in the Twenty-First Century*, 39 OHIO ST. L.J. 671, 677 (1978).
4. 11 U.S.C. §§ 101-151326 (Supp. II 1978).

system pours all of the debtor's property into an "estate"[6] whose trustee is empowered to sell not only the "estate's" interest in these properties, but also the interest of a co-owning tenant by the entirety.[7] Certain criteria must be met, however, before the tenancy by the entirety can be converted to cash. Partition must be impracticable, the sale of the debtor's interest alone must promise to realize a lesser return, and the benefit of the sale of the whole estate must outweigh the detriment to the co-owner.[8] How this balance will be struck in practice remains to be seen.

It now behooves the debtor to claim certain exemptions to extract property from the estate. As a basic rule, he may elect either a federal or a state exemption.[9] The new law, however, licenses the states to cancel the availability of the federal exemption.[10] Be that as it may, the federal exemption for a residence amounts to only $7,500.[11] In states offering better exemptions, or restricting the debtor to the state list, the debtor may do better. This is particularly true in states where a tenancy by the entirety "is exempt from process."[12] In these states, the debtor is entitled to claim this exemption in addition to whatever exemptions the state otherwise allows.[13]

B. Mortgages

Money is a commodity. Any real estate lawyer knows that on a building project not one brick will be set atop another unless the financial foundation has first been securely laid. State usury laws, which have held mortgage interest rates down below prevailing national levels, have discouraged residential first mortgage lenders and, perforce, have tended to dampen the demand for new homes. In the Depository Institutions Deregulation and Monetary Control

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5. Act of Nov. 6, 1978, Pub. L. No. 95-598, tit. IV, § 402(a), 92 Stat. 2682.
6. 11 U.S.C. § 541(a)(1) (Supp. II 1978).
7. *Id.* § 363(h).
8. *Id.* § 363(h)(1)-(3).
9. *Id.* § 522(b)(1)-(2).
10. *Id.* § 522(b)(1).
11. *Id.* § 522(d)(1).
12. *Id.* § 522(b)(2)(B).
13. *Id.* For a critical analysis of this idea, see Ackerly, *Tenants By The Entirety Property and The Bankruptcy Reform Act*, 21 WM. & MARY L. REV. 701 (1980). An excellent overview of the law in New York may be had by reading *In Re* Weiss, 3 BANKR. L. REP. (CCH) ¶ 67,476 (S.D.N.Y. 1980).

Act of 1980,[14] Congress alleviated the burdensome restrictions of state usury laws on federal savings and loan associations: "The provisions of the *constitution* or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges" on residential first mortgages no longer apply to federally regulated lending institutions.[15]

Congress left the states unhappy with this scheme, but free to regain control if usury laws really do express the sentiments of their citizenry. The regime ceases to apply in any state that "adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the provisions . . . ."[16] More worthy of serious note, perhaps, is that this legislation addresses itself to "depository institutions,"[17] suggesting that Congress is moving toward a central conception of the money market that is no longer an atomized picture of commercial banks, savings banks, and savings and loan institutions.

II. Conveyancing

Some years ago, Professor Williston set out to overturn the rule that placed upon the purchaser of a building the risk of accidental destruction between the day the contract of sale was executed, and the day the closing was held and legal title transferred.[18] This was the genesis of the Uniform Vendor and Purchaser Risk Act.[19] The pertinent passage of that act reads:

> (a) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser . . . , the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid . . . .[20]

Given accidental destruction of the building during the typical ex-

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14. Act of March 31, 1980, Pub. L. No. 96-221, *reprinted in* [1980] U.S. Code Cong. & Ad. News.

15. *Id.* § 501(a)(1) (emphasis supplied).

16. *Id.* § 501(b)(2).

17. *Id.* § 501(a)(2)(A); *see id.* § 103(b)(1)(A).

18. Uniform Vendor and Purchaser Risk Act (Commissioners' Prefatory Note), *reprinted in* 14 Uniform Laws Ann. 553 (1980).

19. *Id.* at 554-60.

20. *Id.* § 1(a).

ecutory period, it was clear that the purchaser could walk away from the contract. It was equally clear that the purchaser might insist upon going through with the contract. What was not clear, however, was whether in opting to proceed with the deal, the purchaser had to pay the stipulated contract price or might instead insist upon an abatement in price in light of the building's diminished value.

Contemporary law reviews make interesting reading when it comes to shedding light on this problem. "A further question arises . . . as to the right of the vendee to specific performance with an abatement," suggested a comment writer in Boalt Hall, without, however, resolving the question.[21] A Harvard note writer concluded that "specific performance with compensation may well be allowed under the Act . . . ."[22] A Chicago contributor did not address the precise issue but, as might be expected today, was more concerned with the larger issue of economic efficiency: "It is indeed doubtful whether the Act is worth the cost of litigation it is likely to stir up."[23]

Professor Williston had set out to overturn the English decision in *Paine v. Meller*,[24] which had put the risk of loss on the purchaser, presumably on the quaint theory that in equity the contract vendee was already the owner. New York adopted what was captioned the Uniform Act,[25] but not before the Law Revision Commission altered the pertinent provision.[26] Thus, in New York the Act reads as follows:

> a. When neither the legal title nor the possession of the subject matter of the contract has been transferred to the purchaser: (1) if all or a material part thereof is destroyed without fault of the purchaser . . . , the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he

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21. Comment, *Uniform Vendor and Purchaser Risk Act: Effect on California Law*, 36 CALIF. L. REV. 476, 480 (1948).

22. Note, *The Uniform Vendor and Purchaser Risk Act*, 51 HARV. L. REV. 1276, 1280 (1938).

23. Comment, *Legislation and Risk of Loss Cases*, 5 U. CHI. L. REV. 260, 271 (1938).

24. 31 Eng. Rp. 1088 (Ch. 1801).

25. N.Y. GEN. OBLIG. LAW § 5-1311(3) (McKinney 1978).

26. REPORT OF THE LAW REVISION COMMISSION 706 (1936). The Commission stated: "We approve in essentials the adoption of the uniform act. In some instances which are discussed in detail in the accompanying research study we feel that it should be modified, and we propose a bill so modified." *Id.*

> has paid . . . ; (2) if an immaterial part thereof is destroyed without fault of the purchaser . . . , neither the vendor nor the purchaser is thereby deprived of the right to enforce the contract; but there shall be, to the extent of the destruction . . . , an abatement of the purchase price.[27]

What is all this about?

English cases may have been the rage in Cambridge during the 1930s, but New Yorkers have always been concerned with their own lore. That lore included the common-law rule that placed the risk of loss on the purchaser and left the parties free to adopt their own solution by inserting an express clause in the contract. *Polisiuk v. Mayers*[28] involved just such a contract, the vendor having assumed the risk of loss during the executory period. When the building was destroyed by fire, the purchaser did not quit the scene as the contract entitled him to do, but sued for specific performance with an abatement in the contract price.[29] The purchaser prevailed because the court concluded that this was the very risk that the vendor had undertaken.[30]

The Law Revision Commission thought that its handiwork had negated the result in *Polisiuk*.[31] That is to say, while the Commission's act placed the risk of loss on the vendor, the destruction of the premises only gave the purchaser the option of either rescinding the transaction or purchasing the premises at the contract price.

Another canvass of the same law reviews is revealing, even though the several authors were concerned with the original Uniform Act. The Chicago author was content to observe that "[w]ith some changes and additions this act has been adopted in New York."[32] The Harvard author noted that the New York version "provides for specific performance with compensation if the damage is immaterial."[33] This point was also addressed by the Boalt

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27. N.Y. GEN. OBLIG. LAW § 5-1311(1) (McKinney 1978).

28. 205 A.D. 573, 200 N.Y.S. 97, *appeal denied*, 206 A.D. 765, 200 N.Y.S. 943 (2d Dep't 1923).

29. *Id.* at 574, 200 N.Y.S. at 98.

30. *Id.* at 575, 200 N.Y.S. at 99.

31. "This result is contrary to the result reached in the case of *Polisiuk v. Mayers* . . . ." REPORT OF THE LAW REVISION COMMISSION 778 (1936).

32. Comment, *Legislation and Risk of Loss Cases*, 5 U. CHI. L. REV. 260, 260 (1938).

33. Note, *The Uniform Vendor and Purchaser Risk Act*, 51 HARV. L. REV. 1276, 1277 n.12 (1938).

Hall author: "It seems clear that by expressly providing for specific performance with an abatement where there has been an *immaterial* loss, the New York legislature impliedly excluded any such right where the loss is material."[34] Thus, there emerged in the literature a neat answer in New York to cases of destruction where the contract was silent: the purchaser could either rescind the contract or perform it according to its original terms.

In practice, the New York courts continued to recognize the purchaser's right to specific performance with an abatement even where the building was materially damaged.[35] Why? It appears that the judges properly perceived that the main thrust of the statute was to shift the risk of loss from the purchaser to the vendor. The risk being on the vendor, *Polisiuk* dictated that the purchaser was entitled to an abatement. The New York twist, which bifurcated material and less than material destruction cases, did not actually overturn *Polisiuk*. Moreover, the judges, unlike the Boalt Hall commentator, did not undertake the exercise in logic necessary to illuminate this possibility.

All of this climaxed when, in *Lucenti v. Cayuga Apartments, Inc.*,[36] a Tompkins County *nisi prius* judge unearthed the Law Revision Commission's report. Refusing to give a purchaser specific performance with an abatement in a case involving material destruction, the judge based his decision upon the Law Revision Commission report.[37] Thus, the judge executed the crucial logical exercise. "By clear inference, if a purchaser does not elect to rescind under the authority of this section, he can only insist upon specific performance without any abatement according to the harsh rule unmitigated by the remedial relief under the statute."[38]

The Appellate Division, Third Department, rejected the trial court's reasoning. "Contrary to this legislative history, relied upon by the trial court, the heavy weight of authority has been that this

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34. Comment, *Uniform Vendor and Purchaser Risk Act: Effect on California Law*, 36 CALIF. L. REV. 476, 481 (1948).

35. *See, e.g.*, World Exhibit Corp. v. City Bank Farmers Trust Co., 186 Misc. 420, 59 N.Y.S.2d 648 (Sup. Ct., Kings Co. 1945), *aff'd*, 270 A.D. 654, 61 N.Y.S.2d 889 (2d Dep't), *aff'd*, 296 N.Y. 586, 68 N.E.2d 876 (1946).

36. 90 Misc. 2d 154, 393 N.Y.S.2d 227 (Sup. Ct., Tompkins Co. 1976), *rev'd*, 59 A.D.2d 438, 400 N.Y.S.2d 194 (3d Dep't 1977), *aff'd*, 48 N.Y.2d 530, 399 N.E.2d 918, 423 N.Y.S.2d 886 (1979).

37. 90 Misc. 2d at 156-58, 393 N.Y.S.2d at 229-31.

38. *Id.* at 158, 393 N.Y.S.2d at 230.

statutory provision did not destroy the common law right of the vendee to specific performance with abatement, even in cases where the loss is material."[39] The fly in this ointment was that much of the "authority" referred to by the appellate division was, upon close examination, illusory.[40] Thus, the problem appeared to be whether an accumulated body of possibly "wrong" case law outweighed the recently discovered "true meaning" of the actual statute.

The Court of Appeals perceived the "fundamental issue" in *Lucenti* as the meaning of the pertinent section in the General Obligations Law.[41] But in the Court's view, neither the law nor the Uniform Act "speak[s] to the situation in which a purchaser seeks to enforce the contract notwithstanding that a material part of the realty has been destroyed."[42] Accordingly, the common-law rule enshrined in *Polisiuk* remained in full force "absent a contrary indication in some other portion of the statute or in its legislative history."[43]

The history rehearsed by the Court of Appeals, however, was the history of the Uniform Act. This was the proper "melange"[44] out of which to distill the answer because, witnessing the language of the legislation itself,[45] the New York Legislature must have thought that it was enacting the Uniform Act bottomed on the

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39. 59 A.D.2d at 441, 400 N.Y.S.2d at 195.

40. *See* Burack v. Chase Manhattan Bank, 9 A.D.2d 914, 194 N.Y.S.2d 987 (2d Dep't 1959), *aff'd*, 10 N.Y.2d 879, 179 N.E.2d 509, 223 N.Y.S.2d 505 (1961) (parties agreed that purchaser was entitled to abatement); World Exhibit Corp. v. City Bank Farmers Trust Co., 186 Misc. 420, 59 N.Y.S.2d 648 (Sup. Ct., Kings Co. 1945), *aff'd*, 270 A.D. 654, 61 N.Y.S.2d 889 (2d Dep't), *aff'd*, 296 N.Y. 586, 68 N.E.2d 876 (1946) (dictum); Horowitz v. Haber, 37 Misc. 2d 1036, 236 N.Y.S.2d 237 (Sup. Ct., Kings Co. 1962) (dictum); Burack v. Tollig, 6 Misc. 2d 450, 160 N.Y.S.2d 1008 (Sup. Ct., Westchester Co. 1957) (parties conceded that purchaser was entitled to an abatement). *But see* Rizzo v. Landmarks Realty Corp., 277 A.D. 1094, 101 N.Y.S.2d 151 (4th Dep't 1950), *appeal denied*, 278 A.D. 630, 102 N.Y.S.2d 637 (4th Dep't 1951).

41. Lucenti v. Cayuga Apartments, Inc., 48 N.Y.2d 530, 535, 399 N.E.2d 918, 920, 423 N.Y.S.2d 886, 888 (1979).

42. *Id.* at 538, 399 N.E.2d at 921, 423 N.Y.S.2d at 890.

43. *Id.*

44. *Id.* at 536, 399 N.E.2d at 920, 423 N.Y.S.2d at 889. Mr. Justice Douglas had earlier employed the term "melange" in Aberdeen & Rockish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 328 (1975) (Douglas, J., dissenting). In *SCRAP*, "melange" was used to describe statistics concocted by the Interstate Commerce Commission that the Justice did not find altogether persuasive. *Id.* at 328-29.

45. "This section may be cited as the uniform vendor and purchaser risk act." N.Y. GEN. OBLIG. LAW § 5-1311(3) (McKinney 1978).

work of Professor Williston.[46] Clearly, his work addressed only the problem of risk allocation. "Conspicuously absent from any of these materials is any reference to a purchaser's right to specific performance with an abatement . . . ."[47] Nay, as the Harvard note writer suggested, the Uniform Act might very well support just such a right, not rule it out.[48]

If the Legislature did not intend to enact the Uniform Act and this result, it had an opportunity to set things right. In 1963, the Legislature moved the statute from the Real Property Law to the General Obligations Law, accomplishing this feat by repealing and reenacting the statute.[49] The judicial gloss that recognized the right to abatement even in cases of material destruction had already accumulated so that by reenacting the statute the Legislature manifested its intent that the statute authorized the right. The Legislature, after all, is " 'presumed to have had knowledge of the construction which had been placed on the provision . . . and to have made that construction a part of the re-enactment . . . .' "[50]

Here, perhaps, was the unkindest cut of all *vis-à-vis* the Law Revision Commission's report, which did not feature much in this legislative history culled from the Uniform Act. The General Obligations Law itself was inspired by the Commission as a way to tidy up New York's statutory contract law by accumulating it under one heading. Thus, the Commission reasoned: "In transferring sections from [their] present locations to the new General Obligations Law, no change in existing law is made or intended."[51] Little did the Commission realize that this would not be quite the case with its own version of the risk allocation statute.

What is one to make of this tale? Whatever the statute may have meant, its interpretation had been clear enough in the case

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46. 48 N.Y.2d at 538, 399 N.E.2d at 921, 423 N.Y.S.2d at 890.

47. *Id.* at 537, 399 N.E.2d at 921, 423 N.Y.S.2d at 890.

48. *Id.* at 537 n.3, 399 N.E.2d at 921 n.3, 423 N.Y.S.2d at 890 n.3 (citing Note, *The Uniform Vendor and Purchaser Risk Act*, 51 HARV. L. REV. 1276, 1280 (1938)).

49. N.Y. GEN. OBLIG. LAW § 19-101 (McKinney 1978) (repealed); *id.* § 15-1311 (reenacted).

50. 48 N.Y.2d at 541, 399 N.E.2d at 923, 423 N.Y.S.2d at 892 (quoting *In re* Scheftel Estate, 275 N.Y. 135, 141, 9 N.E.2d 809, 811 (1937)).

51. REPORT OF THE LAW REVISION COMMISSION 272 (1963), *reprinted in* N.Y. GEN. OBLIG. LAW at ix-x (McKinney 1978).

lore until a *nisi prius* judge unearthed its true meaning.[52] The appellate division was content simply to reenter the truth in favor of conventional wisdom. The Court of Appeals purported to pursue the truth, but its ratiocination is suspect because the legislative history it chose to search was a curious melange, if not a red herring.

Still, one can discern the basis of the Court of Appeals' result. The Court quoted from a case involving the statute, albeit a case involving condemnation rather than material destruction.[53] This dictum enabled the Court to suggest that specific performance with an abatement was a "just result" because in all likelihood both parties intended, had they thought about it, to " 'realize, in lesser form, the substance of the agreement.' "[54] By way of a footnote, the Court suggested that its readers might turn their attention to a sentence in the Law Revision Commission's report.[55] An examination of that volume unearths the following notion: "[I]t would seem more reasonable and more in accord with the actual, although unexpressed intention of the parties, to call the deal off upon the destruction of all, or of a substantial part of the property."[56] It also reveals that the case may have been an exercise in result-oriented jurisprudence because the solutions favored by the Court and by the Commission turned out to be diametrically opposed.

III. Constitutional Law

Can persons who wish to pass political handbills in the interior plazas of massive, but privately owned, shopping centers claim the same first amendment rights that they possess on public streets and sidewalks on the theory that these malls have become today's functional equivalent of yesterday's Main Street? No. "The Constitution by no means requires such an attenuated doctrine of

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52. Lucenti v. Cayuga Apartments, Inc., 90 Misc. 2d 154, 393 N.Y.S.2d 227 (Sup. Ct., Tompkins Co. 1976), *rev'd*, 59 A.D.2d 438, 400 N.Y.S.2d 194 (3d Dep't 1977), *aff'd*, 48 N.Y.2d 530, 399 N.E.2d 918, 423 N.Y.S.2d 886 (1979).

53. 48 N.Y.2d at 541, 399 N.E.2d at 923, 423 N.Y.S.2d at 892 (citing County of Westchester v. P. & M. Materials Corp., 20 A.D.2d 431, 248 N.Y.S.2d 539 (2d Dep't 1964)).

54. *Id.* (quoting County of Weschester v. P. & M. Materials Corp., 20 A.D.2d 431, 434, 248 N.Y.S.2d 539, 543 (2d Dep't 1964)).

55. *Id.* at 541 n.6, 399 N.E.2d at 923 n.6, 423 N.Y.S.2d at 892 n.6.

56. Report of the Law Revision Commission 778-79 (1936).

dedication of private property to public use."[57] Thus spoke Mr. Justice Powell who did not believe that property lost "its private character merely because the public is generally invited to use it for designated purposes."[58]

The California Supreme Court recently discovered that its state constitution guaranteed a more expansive liberty of speech that required a different result "even when the centers are privately owned."[59] In *Pruneyard Shopping Center v. Robins*,[60] the United States Supreme Court had to decide whether this socialization of private property went so far that it would have to be "recognized as a taking."[61] The general rule, after all, still remains that "while [private] property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[62] How far that regulation has to go "cannot be disposed of by general propositions."[63] Suffice it to report, Mr. Justice Rehnquist did not find that, on balance, this incursion went too far.[64]

Crucial to this calculus, however, is one's notion of the concept of private property, the protection of which is the point of the whole exercise. It might be thought that this traditional analysis in terms of the taking clause suggests at rock bottom the existence of a federal definition of private property. Yet, Mr. Justice Rehnquist addressed himself to this point: "Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance."[65] And only Mr. Justice Blackmun took special exception to this idea.[66]

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57. Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

58. *Id.* Justices Marshall, Douglas, Brennan, and Stewart disagreed with the majority's holding in *Lloyd*.

59. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, ___, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979) (4-3 decision), *aff'd*, 447 U.S. 74 (1980).

60. 447 U.S. 74 (1980).

61. *Id.* at 82.

62. Pennsylvania Coal v. Mahon, 260 U.S. 393, 414 (1922) (Holmes, J.).

63. *Id.* at 416.

64. 447 U.S. at 83.

65. *Id.* at 84.

66. *Id.* at 88-89 (Blackman, J., concurring). The idea fits nicely into Mr. Justice Rehnquist's "weltanschauung." Mr. Justice Rehnquist also authored Kaiser Aetna v. United States, 444 U.S. 164 (1980), wherein a federal effort to impose a public navigation easement into a private marina was struck down as an uncompensated taking. "Rehnquist abhors the power of the federal government . . . . In fact, the justice defers with enthusiasm to the expertise and paternalism of state officials . . . . [F]rom what should be defined as liberty

IV. Reflections

In academic circles, the commerce clause may still be the litmus by which to test the extent of federal authority over local affairs. In the real world, the economy writ large is the key. Congress has been concerned and has employed fiscal and monetary strategies to underpin the equilibrium of the economy writ large. It has also been quick to deal with anything affecting credit, that lynchpin in the consumer ethos that is the very heart and soul of the economy. We have seen bankruptcy and bank credit reformed this year. As a byproduct, however, state institutions such as the tenancy by the entirety and usury were transmuted or quashed. Thus, while the federal government is not directly legislating a new law of property, a new law of property is being created piecemeal as the result of federal activity.

The fee simple was sacrosanct in the world inhabited by Jefferson's yeomen farmers. Now, the fee simple is tending to become something nearer to a life estate, the tenant of which cannot commit waste, and the remaindermen of which are future generations of the public represented now by the state. The new law of waste is encapsulated under the rubrics of environmental law and land use planning.

Bit by bit new controls whittle away at the traditional notion of fee ownership. Quantitative change ultimately is recognized as accomplishing a qualitative change. These piecemeal restraints, this "petty larceny of the police power"[67] in Mr. Justice Holmes's remarkable phrase, must be seen sometime to have gone too far and to amount to an uncompensated taking of the traditional fee. This will not be so, however, if the very concept of the fee is revolutionized to reduce it to life estate proportions in the first place. And this is the very piece of jurisprudential legerdemain that Mr. Justice Rehnquist has invited the state courts to undertake.

Thus, at one end of the spectrum, the traditional rules of real property law are being rendered asunder as a byproduct of federal economic concerns. At the other end of the spectrum, the very notion of fee ownership is hostage to state concern over the quality of the environment. State courts will have to tread carefully through

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or property, the state knows best." Soifer, *Rehnquist: Trying to Recapture an Imaginary, Idyllic Past,* The National Law Journal, Feb. 18, 1980, at 21, col. 1.

67. 1 Holmes-Laski Letters 457 (M. Howe ed. 1953).

this intellectual minefield if they are going to reconstitute a law of real property that will make any sense in the year 2000. Result-oriented jurisprudence will not be enough if order is to be restored. This is the rub, however, because if the "hi-jinks" discussed in the middle part of this article are the benchmark of state level craftsmanship, the chances of reason prevailing are slim. Intellectual bankruptcy at the state level will invite the very entropy in property law that will require order to be restored to this part of the market economy by an outright federal body of real property law.